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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROGELIO PAYAN,

Defendant.

Case No. 2:16-cr-00246-GMN-NJK

ORDER

15 Pending before the Court is Defendant Rogelio Payan's motion to disclose confidential informants  
16 and related information. Docket No. 43. The Court has considered Defendant's motion, the United States'  
17 response, Defendant's reply, the United States' supplemental brief, the United States' sealed exhibit to its  
18 supplemental brief, and Defendant's supplemental brief. Docket Nos. 43, 45, 46, 54, 55, 62.

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**BACKGROUND**

On August 9, 2016, a federal grand jury sitting in Las Vegas, Nevada issued an indictment charging Defendant with one count of felon in possession of a firearm, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2). Docket No. 1. The indictment alleges that, on or about December 23, 2015, Defendant, who had been previously convicted of a felony offense, knowingly possessed a firearm. *Id.* On August 22, 2016, Defendant made his initial appearance in this Court and entered a not guilty plea to the charge in the indictment. Docket No. 11.

26 Defendant seeks an order requiring the United States to disclose the identity (including the name,  
27 address, date of birth, telephone number, and social security number) of each of the two confidential  
28 informants (CI) used by the United States to obtain a search warrant on December 22, 2015. Docket No.

1 43 at 1. Defendant further seeks an order requiring the United States to produce “the CIs’ files, criminal  
2 histories, all reports, memoranda, statements by/concerning the CIs regarding [him], as well [as] any and  
3 all police reports and record, whether written or recorded, concerning the CIs’ work on other  
4 investigations,” as well as “all payments to the CIs or on the CIs’ behalf.” *Id.* at 2.

5 Defendant submits that the confidential informants gave information to law enforcement regarding  
6 a shooting that occurred on December 11, 2015. *Id.* at 3. The CIs both told law enforcement that, while  
7 they were riding in a vehicle, Defendant intentionally struck their vehicle with his, and fired several  
8 gunshots at them. *Id.* at 3-4. Defendant notes one significant difference in the accounts, as CI #1 stated  
9 that CI #2 returned fire when Defendant began shooting, but CI #2 denied returning fire. *Id.* Defendant  
10 submits that North Las Vegas Police Department Officer Fellig sought, and obtained, a search warrant for  
11 his residence based on the information provided by the CIs. *Id.* at 4-6. On December 23, 2015, when the  
12 search warrant was executed, law enforcement recovered, among other things, the Glock handgun whose  
13 possession is the basis of the charge against Defendant. *Id.* at 7.

14 Defendant further submits that

15 the CIs’ tip is the primary basis for the search warrant application and the only reason the  
16 government obtained the gun in this case. Furthermore, the CIs’ identities are critical to  
17 developing a substantive defense in this case. At least one CI claimed to have repeatedly  
18 entered [Defendant’s] home where the gun was found, as recently as December 2015 -  
19 when the CIs provided the tip and law enforcement executed the warrant. Thus, without  
the CIs’ identities, criminal histories, complete report of the information they provided,  
reports concerning the CIs’ past work for law enforcement, and any payments to, or for,  
the CIs, [Defendant] is unable to fully present his arguments with respect to his *Franks*  
challenge or to develop a substantive defense at trial.

20 *Id.*

21 Defendant contends that the CIs are “percipient witnesses” to his possession of a handgun and are,  
22 therefore, essential to developing his defense. *Id.* at 11. In support of this contention, Defendant notes  
23 that both CIs identified him as shooting at them with a dark semi-automatic gun. *Id.* Further, CI #2  
24 specifically stated that the gun was a Glock and that he/she had seen the black Glock inside Defendant’s  
25 home during that same time period. *Id.* Defendant submits that CI #2 “could” have planted the gun in the  
26 house; “could” have knowledge about the gun and how it came to be in the location where it was recovered  
27 by police. *Id.* at 11-12. Therefore, Defendant contends that the disclosures he has requested regarding the  
28 CIs are “necessary to pursue multiple theories of defense.” *Id.* at 12.

1 Finally, Defendant submits that the United States may claim that it does not request the information  
2 he has asked the Court to order disclosed. *Id.* In that instance, Defendant asks the Court to issue a Rule  
3 17(c) subpoena ordering the North Las Vegas Police Department to produce the information. *Id.*  
4 Defendant submits that the information is relevant for him to fully present his *Franks* motion and to  
5 establish trial defenses. *Id.*

6 In response, the United States relies upon its privilege to withhold the identity of confidential  
7 informants who furnish information to law enforcement regarding violations of law. Docket No. 45 at 4.  
8 The United States notes that, while the privilege is not absolute, Defendant must show a need for the  
9 information in order to obtain disclosure. *Id.* at 5. Here, the United States submits, Defendant has failed  
10 to do so. *Id.*

11 The United States submits that neither CI is a percipient witness to the crime charged in the  
12 indictment - possession of a firearm on December 23, 2015. *Id.* at 6. Further, the United States does not  
13 anticipate calling either CI to testify at trial. *Id.* The United States submits that CI #1 provided the initial  
14 tip to law enforcement that Defendant was involved in a shooting on December 1, 2015. *Id.* CI #2, the  
15 United States submits, provided “corroborating information” regarding Defendant’s involvement in the  
16 shooting. *Id.* The United States contends that this level of involvement does not meet the threshold to  
17 require disclosure of the information Defendant requests. *Id.*

18 Additionally, the United States submits that Defendant has failed to raise a defense that would  
19 warrant disclosure of the requested information. *Id.* at 7. The United States submits that Defendant has  
20 merely speculated about information that the CIs “could” provide and the potential defenses that “could”  
21 be raised, and has therefore failed to show that the requested information would help him establish a  
22 defense at trial. *Id.* The United States contends that it has a strong and legitimate interest in protecting  
23 the identity of the CIs that is not outweighed by Defendant’s speculation. *Id.* Finally, the United States  
24 submits that Defendant has failed to make a sufficient showing to support issuance of a Rule 17(c)  
25 subpoena. *Id.* at 8-9.

26 In reply, Defendant submits that both CIs are percipient witnesses, as they gave information that  
27 led to the issuance of the search warrant. Docket No. 46 at 2. Further, CI #2 told law enforcement that  
28 he/she had been inside Defendant’s residence at least ten times, and had seen a black Glock and other

1 firearms inside the residence. *Id.* at 2-3. As a result, Defendant contends, the CIs are percipient witnesses  
2 to his “alleged firearm possession.” *Id.* at 3. Further, Defendant submits that the requested information  
3 about the CIs is necessary for him to pursue a number of defenses during trial, including “(1) challenging  
4 actual or constructive possession of the Glock; (2) exploring whether CI #2 planted the firearm during one  
5 of [his or her] many times inside the home; and (3) determining whether CI #1 and/or CI #2 have  
6 knowledge about the firearm and how it got to the location where it was found.” *Id.* Defendant submits  
7 that he “cannot investigate and pursue these theories of defense” without the requested information. *Id.*

8         Additionally, Defendant submits that he needs the information for his *Franks* motion. *Id.* As the  
9 search warrant affidavit contains information given to law enforcement from the CIs, Defendant submits  
10 that the requested information is “critical” for him to fully present his *Franks* claim. *Id.* at 4.

11         Alternatively, Defendant submits that the Court should issue a Rule 17(c) subpoena. *Id.* at 7.  
12 Defendant contends that he has met his burden of showing good cause for the production of the documents  
13 he requests. *Id.*

14         After the briefing was complete, the Court ordered supplemental briefing from both parties.  
15 Docket No. 49. The Court found that certain issues exist in the briefing that were not fully addressed by  
16 either party. *Id.* at 2. There fore, the Court gave the parties the opportunity to address the factors that the  
17 Court must consider in making its decision. *Id.* The Court set out certain issues that the United States was  
18 directed to address, and allowed a response on those issues from Defendant, as well as a reply from the  
19 United States. *Id.* at 2-3.

20         In its supplemental briefing, the United States submits that its interest in protecting the identities  
21 of the CIs is significant, as disclosure of the requested information would “potentially put them in serious  
22 physical danger in terms of harassment and retaliation.” Docket No. 54 at 8. In support of this  
23 proposition, the United States points out the shooting of December 11, 2015, as well as the CIs’ knowledge  
24 of Defendant’s gang affiliation, propensity for violence, and the fact that Defendant is on pretrial release.  
25 *Id.* at 8-9. The United States submits, under seal, the criminal history of each CI. Docket No. 55. The  
26 United States contends that even redacted disclosure of the criminal histories would reveal the CIs’  
27 identities. Docket No. 54 at 9-10. Further, the United States submits that neither CI is known by law  
28 enforcement to have participated in any additional crime “during the relevant period beyond what was

1 reported in the search warrant affidavit and is reflected in their criminal histories.” *Id.* at 10. The United  
2 States additionally submits that it “confirmed with law enforcement that neither CI has knowledge of any  
3 exculpatory evidence, both as it relates to December 11, 2015 and December 23, 2015.” *Id.*

4 The United States further submits that, in order to obtain disclosure of the requested information  
5 for *Franks* arguments, Defendant must show a connection between the CIs’ identities and/or criminal  
6 histories and the *Franks* analysis. *Id.* at 2. Here, the United States points out, Defendant alleges in his  
7 *Franks* motion that the affiant “failed to inform the court of the CIs’ criminal histories, he failed to provide  
8 sufficient information regarding the purported shooting, he misrepresented police follow-up of the  
9 shooting[,] he misrepresented whether police believed the CIs’ information was credible, and he  
10 misrepresented that probable [cause] existed to support the warrant.” *Id.* at 2-3. The United States  
11 therefore submits that Defendant’s *Franks* arguments “take issue” with the affiant, and not the CIs and that  
12 Defendant therefore has failed to establish that the probable cause determination relies upon disclosure  
13 of the CIs’ identities. *Id.* at 3. The United States contends that Defendant presents only “supposition and  
14 conjecture” regarding his *Franks* argument and, therefore, has not met the requirements even for an *ex*  
15 *parte in camera* hearing regarding the CIs’ identities. *Id.* at 5.

16 The United States further submits that Defendant’s request for the information regarding the CIs  
17 in order to present a defense at trial is not ripe given the pending motion to suppress. *Id.* In any event, the  
18 United States submits, disclosure of the requested information is unnecessary, as neither CI was a  
19 percipient witness to the crime charged in the indictment. *Id.* at 5-7. Further, the United States submits  
20 that it does not intend to call either CI as a witness at trial in its case-in-chief, nor does it intend to  
21 introduce any evidence related to either CI in its case-in-chief. *Id.* at 10-11. The United States submits  
22 that Defendant’s proffered defense that CI #2 could have planted the gun recovered in his residence is too  
23 attenuated to constitute an essential defense. *Id.* at 7. In further support of its argument that the proffered  
24 defense is not meritorious, the United States submits that the firearm was recovered in Defendant’s  
25 bedroom in his residence while he was present, and his DNA was found on the magazine in the firearm.  
26 *Id.*

27 In his supplemental response, Defendant submits that the search warrant affiant omitted any  
28 mention of the CIs’ criminal histories in the search warrant affidavit. Docket No. 62 at 2. Further,

1 Defendant submits that the fact that one CI had a probation violation for using narcotics at the time he/she  
2 provided the tip to law enforcement, and the fact that this information was omitted from the search warrant  
3 affidavit, negates the credibility and reliability of the CI. *Id.* Defendant further submits that his pretrial  
4 release on conditions, as well as the fact that one of the CIs is currently incarcerated, undercuts the United  
5 States' argument regarding the risk of danger to the CIs. *Id.* at 3.

6 Defendant submits that the United States admits that the CIs are percipient witnesses to the  
7 December 11, 2015, shooting, and that that shooting established probable cause for the search warrant for  
8 his residence. *Id.* at 4. Therefore, Defendant submits, the CIs are witnesses to the unlawful possession  
9 of the firearm. *Id.* Defendant points out that he is challenging the warrant and submits that, in order to  
10 determine if the warrant contains *Franks* violations, the information he is requesting must be disclosed.  
11 *Id.* Further, Defendant submits that he seeks disclosure to pursue a "number" of trial defenses, including  
12 the possibility that "one or both" CIs planted the gun in his residence, or knows who did plant it. *Id.* at  
13 4-5.

14 Defendant further submits that the United States' argument that his DNA is on the magazine found  
15 in the firearm is a red herring. *Id.* at 6. Defendant contends that the lab report on the magazine indicates  
16 a finding of DNA from at least three individuals, at least one of whom is male. *Id.* Further, Defendant  
17 submits that the lab report on the firearm indicates a finding of DNA from at least four individuals, at least  
18 one of whom is male. *Id.* Defendant contends that the lab report does not identify him as one of the DNA  
19 contributors on the firearm and, therefore, does not preclude his defenses at trial. *Id.*

20 Defendant submits with no authority that, since the United States "neglected to inform the Court  
21 that one of the CIs was facing a probation violation for using narcotics at the time [he/she] provided the  
22 tip" about the shooting, this Court "should order production of the CIs' full criminal histories, and the  
23 other items of information sought, to the defense." *Id.* at 7. Defendant further submits that he has  
24 significant concerns about the United States' representation that it confirmed with law enforcement that  
25 neither CI has exculpatory information, as he submits that the officers who investigated the instant case  
26 committed *Franks* violations and "cannot be expected to distinguish ... exculpatory evidence from other  
27 types of evidence." *Id.* at 8. Additionally, Defendant asserts that one CI is "in custody for multiple  
28 felonies," and therefore, it is unlikely that law enforcement spoke to that CI. *Id.*

1 Defendant notes that the United States has submitted it will not call either CI as a witness or  
2 introduce any CI statements in the affidavit in its case-in-chief. *Id.* Nonetheless, Defendant find it “hard  
3 to imagine” how the United States will present its theory of prosecution without presenting the warrant.  
4 *Id.* Further, Defendant challenges the United States’ assertion that he would want to preclude the  
5 testimony of the CIs at trial. *Id.* Instead, Defendant submits that both CIs “may” have information about  
6 how the firearm came to be located in his residence, as CI #2 had been in his residence and “presumably”  
7 had numerous opportunities to plant the firearm, and CI #1 saw CI #2 shoot at Defendant on December  
8 11, 2015. *Id.* Defendant therefore submits that the CIs’ testimony is not totally inculpatory, and that  
9 disclosure of the requested information is necessary so that he can “investigate and determine the value  
10 of their potential testimony.” *Id.* at 9.

11 Defendant submits that, as he believes he knows the CIs’ identities and at least part of their  
12 criminal histories, an *ex parte in camera* hearing must be held. *Id.* at 10. Defendant submits that he has  
13 made the required minimal showing that disclosure would be relevant to his defense. *Id.* at 11-12.

14 The United States did not file a supplemental reply. *See* Docket. The Court held a bifurcated *ex*  
15 *parte in camera* hearing on August 7, 2017, and on August 11, 2017. Docket Nos. 75, 77. Prior to the  
16 hearing, the Court allowed Defendant to submit questions for the officers, which the Court agreed to  
17 consider asking. Docket No. 71 at 2. Defendant submitted a list of questions prior to the hearing. Docket  
18 No. 74. During the hearing, the Court heard the testimony of Officers Forsberg, Fellig, and Ochoa and,  
19 among other questions, asked the questions submitted by Defendant that the Court deemed appropriate.  
20 Docket Nos. 75, 77.

### 21 ANALYSIS

22 Disclosure of a confidential source is required only where it would be relevant and helpful to the  
23 defense or essential to a fair trial. *Rovario v. United States*, 353 U.S. 53, 60–61 (1957). The *Rovario* test  
24 requires the court to balance the government's interest in protecting the source of information, the public's  
25 interest in protecting the flow of information, and the defendant's right to prepare his or her defense. *See*  
26 *United States v. Whitney*, 633 F.2d 902, 911 (9th Cir. 1980) (citing *Rovario*, 353 U.S. at 62). In weighing  
27 these interests, the court should consider “the crime charged, the possible defenses, the possible  
28 significance of the defendant's testimony, and other relevant factors.” *Rovario*, 353 U.S. at 62. Where the

1 informant's identity is “relevant and helpful” to the defense or is “essential to a fair determination of the  
2 case,” the government's privilege to withhold that information must give way. *Id.* (citing *Rovario*, 353  
3 U.S. at 60–61). Defendant bears the burden of proof to demonstrate the need for disclosure. *United States*  
4 *v. Williams*, 898 F.2d 1400, 1402 (9th Cir. 1990).

5 To obtain disclosure, therefore, Defendant must show a need for the information and must show  
6 more than a “mere suspicion” that the informant has information which will prove “relevant and helpful”  
7 to his defense or that will be essential to a fair trial. *United States v. Henderson*, 241 F.3d 638, 645 (9th  
8 Cir. 2001). “Balancing the defendant's and the government's interest, a district court must hold an *in*  
9 *camera* hearing whenever the defendant makes a minimal threshold showing that disclosure would be  
10 relevant to at least one defense.” *Id.* (internal citations and quotations omitted).

11 To gain access to an informant's identity, the defendant must articulate facts showing that “in an  
12 actual trial of a federal criminal case,” the informant can provide information “relevant and helpful to the  
13 defense of an accused” or “essential to a fair determination of [a] cause”—especially where the informant  
14 is an active participant or witness to the charged offense. *Roviaro*, 353 U.S. at 60–61. Disclosure of an  
15 informant's identity is proper when there is “more than a ‘mere suspicion’ of the value” of the informant's  
16 information. *United States v. Amador–Galvan*, 9 F.3d 1414, 1417 (9th Cir. 1993) (quoting *United States*  
17 *v. Williams*, 898 F.2d 1400, 1402 (9th Cir. 1990)).

18 Should the Court conclude that disclosure of the informant's identity might be necessary, the Court  
19 must balance several factors, including, but not limited to: (1) the crime charged; (2) possible defenses;  
20 and (3) the possible significance of the informant's testimony. *Roviaro*, 353 U.S. at 62; *United States v.*  
21 *Si Keung Wong*, 886 F.2d 252, 255–56 (9th Cir. 1989). This assessment requires “balancing the public  
22 interest in protecting the flow of information against the individual's right to prepare his defense.”  
23 *Roviaro*, 353 U.S. at 62. Other “relevant factors” include consideration of the informant's safety  
24 following disclosure. *Wong*, 886 F.2d at 256.

25 Here, Defendant is charged with one count of felon in possession of a firearm that was recovered  
26 in his residence. The information provided by the CIs was used, in part, establish probable cause for a  
27 search warrant for Defendant’s residence. The Court finds that Defendant has not met his burden. The  
28 Court finds that the motion and supplemental filings do not establish that disclosure of the CIs’ identities



1 would be relevant to at least one defense. The only specific defense Defendant identifies constitutes  
2 nothing more than mere suspicion, that “CI #2 *could* have planted the gun” in Defendant’s residence.  
3 Docket No. 43 at 11 (emphasis added). *See also* Docket No. 62 at 8 (CI #2 “presumably had numerous  
4 opportunities to plant the gun”). Further, Defendant contends that disclosure of the CIs’ identities and  
5 criminal histories is “necessary for [him] to investigate and determine the value of their potential  
6 testimony.” Docket No. 62 at 9. “Our cases do not permit [Defendant] to go on a fishing expedition into  
7 the informant’s background because ‘a mere suspicion that the information will prove helpful will not  
8 suffice’ to demonstrate a need for disclosure.” *United States v. Rowland*, 464 F.3d 899, 909 (9th Cir.  
9 2006) (internal citation omitted). *See also United States v. Johnson*, 886 F.2d 1120, 1122 (9th Cir. 1989)  
10 (“mere suspicion that information will prove helpful is insufficient to require disclosure”). The Court  
11 therefore finds that Defendant’s conclusory assertions fail to meet the burden of establishing that the CIs’  
12 identities are relevant and helpful to any specific defense or essential to a fair determination of the case.

13 Additionally, the Court had the opportunity to question three different law enforcement officers  
14 during the *ex parte in camera* hearing. Docket Nos. 75, 77. Each officer testified in detail regarding  
15 specific concern for the safety of each CI if the information requested was disclosed. The Court is  
16 convinced that the concern for the safety of the CIs is real, and that disclosure would almost certainly place  
17 each CI in significant personal danger.

18 Further, the United States has represented that it does not intend to call either CI as a witness at  
19 trial. The CIs are not percipient witnesses to the crime charged in the indictment. *See United States v.*  
20 *Forest*, 2013 WL 1145113, at \*5 (D.Nev. 2013). The information given by the CIs was used to establish  
21 probable cause for the search warrant that was executed at Defendant’s residence. Neither CI was present  
22 during the execution of the search warrant, or was involved in the crime charged in the indictment. The  
23 Ninth Circuit has held that there is no right to disclosure where the informant is relevant only to probable  
24 cause to search. *United States v. Williams*, 898 F.2d 1400, 1402 (9th Cir. 1990). *See also United States*  
25 *v. Decoud*, 456 F.3d 996, 1009 (9th Cir. 2006) (involvement of informant in securing wiretap insufficient  
26 to compel disclosure of informant’s identity); *United States v. Whitney*, 633 F.2d 902, 911 (9th Cir. 1980)  
27 (disclosure not warranted where charge predicated on heroin found in camera seized from the defendant  
28 and not on informant's observations of drug transactions); *Johnson*, 886 F.2d at 1122 (disclosure not

1 warranted where defendant not charged based on transaction with informant).

2 Based on all of the information presented, the Court finds that Defendant has failed to adequately  
3 demonstrate that the CIs have information that will prove “relevant and helpful” to his defense or that will  
4 be essential to a fair trial. *United States v. Henderson*, 241 F.3d 638, 645 (9th Cir. 2001). Additionally,  
5 the Court finds that the danger to the CIs resulting from disclosure is significant, and that they are not  
6 percipient witnesses to the crime charged in the indictment. Further, the United States has affirmatively  
7 represented that it does not intend to call either CI to testify at trial. Defendant has not presented more  
8 than mere suspicion that CI #2 could potentially help his defense, which is insufficient to meet his burden.<sup>1</sup>

9 Accordingly, Defendant’s motion to disclose confidential informants and related information,  
10 Docket No. 43, is hereby **DENIED**.

11 IT IS SO ORDERED.

12 DATED: August 15, 2017.

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15 NANCY J. KORPE  
16 United States Magistrate Judge  
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27 <sup>1</sup>As the Court finds that Defendant has failed to meet his burden for disclosure, the Court need not  
28 reach Defendant’s request for a Rule 17( c) subpoena for disclosure documents not possessed by the United  
States. Docket No. 43 at 12-13.